

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program.

Rulemaking 04-04-026
(Filed April 22, 2004)

**ADMINISTRATIVE LAW JUDGE'S RULING
ON MOTIONS FOR LEAVE TO FILE UNDER SEAL AND
FOR PROTECTIVE ORDERS**

Background

In connection with filing their procurement plans for the Renewables Portfolio Standards (RPS) program, Pacific Gas & Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison (Edison) also filed requests to protect certain material in the procurement plans and in presentations to Commission staff and advisors.¹ The procurement plans were filed and served in both redacted and unredacted versions. In the Administrative Law Judge's (ALJ) Ruling Requiring Resubmission of Motions to File under Seal (April 27, 2005), the ALJ, noting the passage of Senate Bill

¹ These requests are: Motion of Pacific Gas and Electric Company (U 39E) to File Under Seal (March 7, 2005); Southern California Edison Company's (U 338-E) Motion for Confidential Treatment of Unredacted Version of its Renewable Procurement Plan pursuant to Pub. Util. Code §§ 583 and 454.5(g) and Protective Order (March 7, 2005); Motion of San Diego Gas & Electric Company (U 902 E) for Authority to File and Maintain Confidential, Commercially Sensitive, Proprietary Information under Seal and for Protective Order (April 15, 2005); and Motion of Pacific Gas and Electric Company (U 39 E) for Leave to File Confidential Material under Seal (April 21, 2005).

(SB) 1488 (Bowen), instructed the three utilities to present more detailed justification for the confidentiality requests in resubmitted motions. The motions were resubmitted on May 12, 2005.² Greenpower Institute (GPI) and the Independent Energy Producers Association (IEP) filed oppositions to the motions on May 23, 2005. Pursuant to leave granted by the ALJ, PG&E, Edison, and SDG&E filed replies to the oppositions on May 31, 2005.

With their resubmitted motions, two utilities also made public some information that had previously been redacted in their plans. SDG&E filed Amended Short-Term and Long-Term Renewable Procurement Plans (May 17, 2005), in which it “unredacted” the charts and tables showing its projected mix and quantity of renewable sources of energy for the years 2010 and 2014. The amended version also made available SDG&E’s retail sales projection for 2009-2010, its current contracts for renewable energy in 2010, and information for 2003, 2004, and 2005 that is now publicly available in other documents. Edison, noting that its 2005 compliance filing had provided certain information, included an appendix to its resubmitted motion in which it unredacted information about

² Pacific Gas and Electric Company’s (U 39-E) Re-Submission of Motion for confidential Treatment per ALJ’s Ruling dated April 27, 2005 (PG&E Revised Motion); Supplement to Motion of San Diego Gas & Electric Company (U 902 E) for Authority to File and Maintain Confidential, Commercially Sensitive, Proprietary Information under Seal and for Protective Order (SDG&E Supplement); Southern California Edison Company’s (U-339-E) Revised Motion for Confidential Treatment of Unredacted Version of its Renewable Procurement Plan pursuant to Pub. Util. Code §§ 583 and 454.5(g) and Protective Order (Edison Revised Motion). Attached to Edison’s motion is a paper describing research commissioned by Edison on the effects of asymmetrical information disclosure in certain bilateral negotiations constructed by the researchers. Since this paper has neither been published in a peer-reviewed journal nor been subject to cross-examination in this proceeding, it will not be considered in this ruling.

contracts resulting from its 2003 and 2004 interim solicitations, and figures for its 2004 and 2005 renewables procurement. Edison also provided the name of the technology for a proposed large solar thermal project.

Discussion

1. Procurement plans

In their resubmitted motions, the utilities pressed their initial arguments that the redacted material must remain confidential because the detailed information provided could affect the price of power procured through RPS solicitations. This information is variously labeled as “market sensitive” under Pub. Util. Code § 454.5(g),³ as trade secrets pursuant to Civ. Code § 3626.1(d), and as potentially placing the utilities at an “unfair business disadvantage” for purposes of General Order 66-C.⁴ These arguments are not, as a rule, made with particularity as to each element of the information the utilities deem confidential, as instructed by the ALJ’s April 27 ruling. Instead, the utilities argue that the details of their RPS planning are inherently market sensitive. Any of the information they seek to protect, whether taken as single pieces or, as PG&E presents it, all together as a plan for attaining RPS compliance, would reveal information that bidders could use to drive up the price of contracts in RPS solicitations. The utilities assert that the California renewable energy market is inelastic, because everyone knows that the utilities are required to attain the renewables goal 20% of retail sales by 2010. Thus, *any* additional information

³ All references to sections are to the Public Utilities Code unless otherwise specified.

⁴ These lenses for viewing the information are succinctly covered in Edison’s Revised Motion, at pp. 3-5.

about the utilities' plans has the potential for increasing the price of renewable energy bid into an RPS solicitation.

Oppositions to the resubmitted motions, filed by GPI and IEP, focus on two points. One claim, made principally by GPI, is that much of the information sought to be protected can be reasonably approximated from otherwise publicly available information, including the utilities' compliance filings of March 2005 and the 2004 Market Price Referent (MPR). It is therefore not worth protecting. GPI also notes that, as the utilities point out, the procurement plans are illustrative, and not a commitment to procure that quantity of energy from those types of sources. It is thus difficult, GPI argues, to find specific harm from the release of information for scenarios that may never come to pass. The other claim, made principally by IEP, is that a competitive market in renewable energy will work better if the potential suppliers have better information about what the potential buyers are interested in buying, and when they would like to buy it. Both oppositions note that ratepayers are protected from RPS price gouging by the Commission's authority, pursuant to § 399.(a)(5)(c), to direct a utility to renegotiate contracts or conduct a new solicitation if a solicitation produces "bid prices that [the Commission determines] are elevated due to a lack of effective competition amongst the bidders."

In reply, the utilities all reassert their views that releasing the information is likely to increase prices, and suggest that the prospect of lower prices from more competition is less likely than the prospect of increased prices. Edison elaborates on this point, arguing that although the utilities must provide important information, potential suppliers are under no obligation to reveal anything to the utilities, the potential buyers. PG&E also notes that voiding a solicitation is hardly a positive outcome for ratepayers, and argues that it is not

sensible to rely on that mechanism to solve the problem of potential price increases due to disclosure of information.

It is not possible to choose, in this limited context, between the utilities' claims that revealing more information is likely to drive up prices and the opponents' claims that more information is likely to produce better planning and more competition and thus is likely to result in lower prices (or at least not higher prices) for RPS contracts. Each side treats its arguments as self-evident. There is little RPS contracting experience on which to base evaluation of these competing claims. No evidence has been taken in this proceeding on the parties' conflicting predictions. The parties have not examined whether the structure of the RPS program affects their analysis.⁵ The parties are thus essentially at a stand-off in making their arguments about what damage, or how much damage, could be done by the public release of more detailed information.

This dispute about information disclosure has significant consequences for the conduct of this proceeding and for the ability of the interested public to evaluate the RPS program. It takes place against the backdrop of a larger controversy relating to confidentiality, which will be explored in the rulemaking the Commission is developing to implement the Legislature's direction in SB 1488.

⁵ The MPR establishes "the market price of electricity for terms corresponding to the length of contracts with renewable generators," § 399.15(c), which presumably the utility and thus the ratepayers would pay if not for the RPS contract. All RPS contracts require individual review and approval by the Commission. (§ 399.14(c). Requests for Supplemental Energy Payments (SEPs) for above-MPR contracts are reviewed by the Energy Commission. (§ 399.13(c).) The pool of SEP funds, while not small, is limited. The utilities' annual obligations, and thus the ratepayers' exposure, is limited to contracts at or below the MPR and available SEPs. (§ 399.15(b)(4).)

This ruling, however, is limited by the need to keep the 2005 RPS solicitation process on track. Deferring a detailed examination of confidentiality protections and their rationale to the new rulemaking, this ruling seeks the least disruptive means to provide basic planning information in this proceeding. This ruling therefore asks two questions to determine whether information should be protected:

1. Is the information publicly available or derived or calculated from public information?
2. Is the information or category of information publicly revealed by another utility?

This approach will provide equal public access to information for all three utilities and provide a comparative basis for analyzing the utilities' planning.

The first question allows identification of information that should not be under seal in this proceeding because it already is publicly available in some form. An example of information that is simply calculated from other information is PG&E's Table 2, in which line 1, "renewable energy" has been redacted. This line, however, is merely arithmetic, the product of "retail sales" (line 2) and RPS generation as a percentage of previous year sales (line 7), both not redacted.

SDG&E's amended plan provides the most information made public by a utility. SDG&E presents public "snapshots" of its projected resource mix and quantities of energy for 2010 and 2014. These snapshots provide the most basic information needed for evaluating SDG&E's short and long-term plans and evaluating policy choices for the RPS program. The snapshots do not reveal the dynamics of SDG&E's procurement strategy, and do not identify year-by-year procurement goals. Nor do they present any information about pricing, or from

which pricing can be inferred. SDG&E's release of the snapshots assists the RPS planning process without revealing SDG&E's bargaining position with respect to any particular contract negotiation.

This is a reasonable initial approach to confidentiality in the RPS program context. Since SDG&E is far from its RPS goals, it is reasonable to conclude that SDG&E would be more rather than less protective of information that could affect RPS bidding. Taking the categories of information that SDG&E has made public as a template for PG&E and Edison is thus a conservative approach to the disclosure of information in the procurement plans.⁶

PG&E and Edison should file and serve amended versions of their procurement plans, to provide public access to the following previously redacted information:

PG&E procurement plan

- Table 1, all rows for the columns labeled 2010 and 2014 (matching SDG&E Table 3 and Table 4).
- Table 2, all years in line 1, "renewable energy." (This line is merely arithmetic, the product of "retail sales" (line 2) and RPS generation as a percentage of previous year sales (line 7), both publicly available.)

Edison procurement plan

- Table 7, all columns in line labeled "Total" for each of the four cases (matching SDG&E Table 4).

⁶ This ruling applies to the three utilities currently filing procurement plans in this proceeding. The ground rules for RPS participation of energy service providers and community choice aggregators will be spelled out by the Commission during 2005. See §§ 399.12(b)(2), (3)(C).

- Table 8, all columns in line labeled “Total” for each of the four cases (matching SDG&E Table 4).
- Edison should also create a new line for Tables 7 and 8, “2010 total,” which sums the information presented for earlier years, to create a snapshot view of 2010 comparable to that for SDG&E and PG&E.

In addition, Edison should integrate the information it made public in Appendix A of its Revised Motion:

- Table 2, including the redacted last line (publicly available in Advice Letter 1876-E (March 8, 2005)).
- Figure 3. Edison should also make publicly available the columns for 2006-2014, since this figure is derived from publicly available information. Edison may combine the “future renewables” and “wind repowers/expansions” categories to avoid releasing the details of those projections.
- Pages 15 and 16.

2. *Ex Parte* Materials

a. PG&E

On April 21, 2005, PG&E filed an *ex parte* notice for a meeting on March 22, 2005. The written materials for the notice were filed under seal, with a motion to file under seal. In its re-submission of its motion on May 12, 2005, and in errata dated May 18, 2005, PG&E identified the subject of the *ex parte* notice as a different meeting on March 28, 2005. The materials provided to the ALJ are for the March 22 meeting. Applying the arguments made by PG&E about its procurement plan and the *ex parte* materials (some of which appear to be the same for both meetings), it is evident that not all of this material is entitled to

confidential treatment. PG&E should re-file the *ex parte* notice for the March 22, 2005 meeting to make publicly available:

- Page 1 (agenda);
- Page 3 (2005 RPS plan);
- Page 5 (2010 renewable energy by resource type); and
- Page 7 (transmission concepts).

b. Edison

Edison filed a redacted version of the written materials used in an *ex parte* meeting on March 24, 2005, but did not seek leave to protect these materials. A *sua sponte* review of these materials shows that some of the material should not be protected. Edison should file a new notice and make publicly available all the information identified in this ruling for public release that is used in the materials attached to the *ex parte* notice.

3. Protective Orders

The parties seeking protective orders recommend the adoption in this proceeding of the protective order adopted in R.01-10-0224 in the ALJ ruling dated May 20, 2003. This request should be granted at this time. If it appears at a later point in this proceeding that the parameters of this protective order should be revisited, a schedule for comments will be set.

4. Future Confidentiality Requests

All requests to file under seal made in this proceeding in the future must show with particularity why protection should be given to each item of information sought to be protected. Motions without such a showing may be

denied on that basis. Parties wishing to file *ex parte* notices with written materials under seal must comply with this requirement.

IT IS RULED that:

1. Pacific Gas and Electric Company's (PG&E) Re-Submission of Motion for Confidential Treatment per Administrative Law Judge's Ruling dated April 27, 2005 is granted, except to the extent set out in paragraph 2.

2. PG&E shall, not later than June 16, 2005, file and serve a revised version of its procurement plan dated March 7, 2005, to make publicly available the following previously redacted information:

- Table 1, all rows for the columns labeled 2010 and 2014; and
- Table 2, all years in line 1, "renewable energy."

3. PG&E's Motion of Pacific Gas and Electric Company (U 39 E) for Leave to File Confidential Material under Seal is granted except to the extent set out in Paragraph 4.

4. PG&E shall, not later than June 16, 2005, file a revised version of its ex parte notice and attached written material for the ex parte meeting of March 22, 2005, to make publicly available the following previously withheld information:

- Page 1 (agenda);
- Page 3 (2005 RPS plan);
- Page 5 (2010 renewable energy by resource type); and
- Page 7 (transmission concepts).

5. San Diego Gas & Electric Company's Motion for Authority to File and Maintain Confidential, Commercially Sensitive, Proprietary Information under Seal and for Protective Order, as supplemented, is granted.

6. Southern California Edison Company's (Edison) Revised Motion for Confidential Treatment of Unredacted Version of its Renewable Procurement

Plan pursuant to Pub. Util. Code §§ 583 and 454.5(g) and Protective Order is granted, except to the extent set out in Paragraph 7.

7. Edison shall, not later than June 16, 2005, file and serve a revised version of its procurement plan dated March 7, 2005, to make publicly available the following previously redacted information, information provided by Edison in its Revised Motion, and information required by this ruling:

- Table 7, all columns in line labeled “Total” for each of the four cases;
- Table 8, all columns in line labeled “Total” for each of the four cases;
- A new line for Tables 7 and 8, “2010 Total,” which sums the information presented for earlier years.
- Revised Table 2, with no redactions;
- Revised Figure 3, with no redactions other than combining the categories for “future renewables” and “wind repowers/expansions;”
- Revised pages 15-16.

8. Edison shall, not later than June 16, 2005, file an amended *ex parte* notice and attached written material for its March 24, 2005 *ex parte* meeting that makes publicly available the previously redacted information identified in this ruling that is used in the materials attached to the *ex parte* notice.

9. The protective order issued May 20, 2003 in Rulemaking 01-10-024 shall apply to the material under seal in this proceeding until further notice.

Dated June 9, 2005, at San Francisco, California.

/s/ ANNE E. SIMON
Anne E. Simon
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling on Motions for Leave to File Under Seal and for Protective Orders on all parties of record in this proceeding or their attorneys of record.

Dated June 9, 2005, at San Francisco, California.

 /s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.